No. 11701

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

M. A. WYMAN, doing business as M. A. WYMAN LUMBER COMPANY; M. A. WYMAN, M. H. WYMAN and EDWARD DORAN, doing business as WYMAN MILL COMPANY, and M. A. WYMAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE HOWARD C. SPEAKMAN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS
United States Attorney

JOHN E. BELCHER
Assistant United States Attorney

OFFICE AND POST OFFICE ADDRESS:
1020 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court for the Western District of Washington, Northern Division, Honorable Howard C. Speakman, visiting judge, presiding. The action was commenced in the name of Chester Bowles, Administrator, Office of

Price Administration, for alleged violations of the Emergency Price Control Act of 1942 (50 U.S.C. App. 901) as amended, seeking injunctive relief and treble damages for alleged overcharges in the sale of lumber.

Jurisdiction of the cause is conferred by the provisions of Section 205(c) of the Act as amended.

The violations alleged, set out in two counts in the amended complaint, consisted of practices on the part of appellants which it is alleged constituted violations of Maximum Price Regulation 539, covering custom milling and kiln-drying of Western softwoods *(9 Fed. Reg. 6152)*, without special authorization from the Office of Price Administration (Section 4(b) MPR 539), which regulation was issued pursuant to Section 2(a), Section 2(b) and Section 201 (d) of the Price Control Act as amended.

It was also alleged and proved in and under the second count that the defendants from July 11 to and including December 22, 1944, owned and controlled a sawmill producing lumber of a species of Western softwood lumber covered by Revised Maximum Price Regulation 26 and also owned and controlled a "custom mill" selling and providing "custom mill" services on the lumber produced by the sawmill to purchasers for use in the course of trade or business, without securing authorization from the Office of Price Administration

to charge "custom milling" prices as set forth in Section 4(b) MPR 539 for such services, and that the total prices charged for said services and lumber were in excess of the maximum prices established by Table 2 RMPR 26 for lumber as delivered to the purchaser.

Before trial, Paul A. Porter was substituted for Chester Bowles (R. 54) and the cause proceeded to judgment in his name.

In its judgment (R. 72-3) the court dismissed the first count (seeking injunctive relief) but awarded single damages on Count II in the sum of $19,130.67 with costs.

Motions for a new trial were interposed (R. 73-75) and denied (R. 79-81).

After judgment, the United States of America was substituted as party plaintiff (R. 85) after which notice of appeal was served and filed (R. 86).

There are thirteen assignments of alleged error (R. 92-93), but counsel argues only nine of them.

ARGUMENT

To a proper understanding of the case it is necessary first to know the provisions of the regulations alleged to have been violated, so we will set them out briefly herein:

Maximum Price Regulation 539 (9 Fed. Reg. 6152) was authorized under the provisions of Section 2 (a), Section 2(b) and Section 201(d) of the Price Control Act, 50 U.S.C. App. 921, and inter alia provides:

> Sec. 1. *Sales of custom milling or custom kiln drying services on Western softwood lumber at higher than maximum prices prohibited.* (a) On and after June 5, 1944, no person shall sell or provide, and no person shall buy or receive in the course of trade or business, custom milling or kiln drying services on Western softwood lumber, at prices higher than the maximum prices set by this regulation; and no person shall agree, offer, or attempt to do any of these things.
>
> Sec. 2. *What is Western softwood lumber?* "Western softwood lumber" under this regulation means any lumber which on sales by the sawmill is subject to RMPR 26 (Douglas Fir and other West Coast Lumber). * * *
>
> Sec. 3. *What is "custom milling" service?* Under this regulation "custom milling" means only the operations specifically included under Section 12 performed, as a service for others, upon lumber *in which the person performing these services has no financial interest.* (39:3991 OPA Service.)
>
> Sec. 4. *What is a "custom mill?"* Even though the services you may perform may meet the definition of "custom milling" above, this regulation does not apply to you unless you qualify as a "custom mill" under this section.
>
> (a) *General.* A "custom mill" is one which performs "custom milling" services upon lumber sub-

ject at mill level to RMPR 26 * * * and which:

(1) Does not operate a "mill" under the definitions contained in RMPR 26 * * *.

(2) *Does not own or control, is not owned and controlled by and is not under common control with "mill" producing the species covered by RMPR 26 * * * wherever located.*

(b) Operation not qualifying under paragraph

(a) may get special permission. If you do not qualify as a "custom mill" under paragraph (a) above, you may under certain special conditions get authority to operate under this regulation. The rules covering this are as follows:

(1) An application must be filed with the OPA Regional Office nearest the operation. This application must show:

(Then follows four requirements.)

(2) Special authorization under paragraph (b) will be granted only where the application enables the Regional Office to make findings that the authorization:

(i) Will result in greater production of surfaced boards or dimension or kiln dried lumber. * * * (39:3992 OPA Service.)

Sec. 9. *Enforcement.* Persons violating any provision of this regulation are subject to the criminal penalties, civil enforcement actions, suits for treble damages, and proceedings for suspension of licenses provided by the Emergency Price Control Act of 1942 as amended.

* * *

Sec. 12. *Maximum prices.* The maximum prices per one thousand feet board measure for "custom

milling of lumber which on mill sales is subject to RMPR 26 * * * shall be as follows:

(Here follows Tables 1 and 2.) (39:3994 OPA Service.)

Maximum Price Regulation 26, as amended (9F. R. 1016, 3513, 4227, 7505, 9720, 11,112, 12,537; 10F.R. 4661, 5099, 5323) provides, inter alia:

"Article II. Maximum prices and terms of sale. Sec. 5. *Basic prices and cash discount.* (a) Basic prices. The maximum prices f.o.b. mill are set forth in Article V—Price Tables.

Sec. 7. *Sales on delivered basis.* (a) Rail charges. (1) Only two methods of selling are recognized by this regulation. Any other method is prohibited, as a device to evade the ceiling by manipulation of freight.

The two permitted methods are: On a delivered basis using the estimated weights in Article VII or on an f.o.b. mill basis with actual freight (figured of course on actual weights) to be paid by the purchaser.

The two methods may not be combined in a single transaction; that is, a seller may not sell on a basis which gives him the benefit of favorable estimated weights, but require the use of actual weights on items where estimated weights would be unfavorable to him. * * *

Sec. 16. *Prohibited practices.* (a) General. Any practice which is a device to get the effect of a higher-than-the-ceiling price without actually raising the dollars-and-cents price is as much a violation of this regulation as an outright over-ceiling price. This applies to changes in credit practices and cash discounts and *to devices mak-*

ing use of commissions, *services*, transportation arrangements, premiums, special privileges, tying agreements, trade understandings and the like." (Italics ours.)

Article V—Price Tables—Sec. 23—shows the maximum ceiling prices for different sizes S4S of Douglas Fir Lumber, too lengthy to set out herein.

The sales in question were made between July 11, 1944, and December 22, 1944, and Table 2 of Sec. 23 of Article V of RMPR 26 was amended by Amendment 5 issued January 26, 1944, and effective February 1, 1944 (9F.R. 1016).

Table 2 was not again amended until May 4, 1945, by Amendment 13 (10F.R. 5099). Thus the table that controls the sales here involved is contained in Amendment 5.

Exhibit "A" attached to the amended complaint sets out in detail all sales made by appellants from July 11, 1944, to December 22, 1944, showing the purchasers, date of purchase, amount collected, the ceiling price, and the amount of overcharge in each instance, all aggregating the sum of $19,130.67. (R. 21-23).

The allegations contained in paragraphs 1, 2, 3, 4 and 5, Count I of the amended complaint were adopted in paragraph 1 of Count II and made a part

thereof by reference and without repetition. (R. 17).

It was alleged (R. 15) and proved (R. 228) that the Granite Falls Planing Mill, Inc., was engaged in the business of milling Western softwood lumber, and that the principal officers and stockholders of said corporation from July 11, 1944, to December 22, 1944, were M. A. Wyman, M. H. Wyman and Edward Doran (paragraph V. amended complaint). After alleging in paragraph 6(A) (R. 16) that defendants were engaged in acts and practices thereafter described which constituted a violation of MPR 539—Custom Milling and Kiln Drying of Western Softwoods (9F.R. 6152) (sub-paragraphs B and C of paragraph 6 (R. 16) of the amended complaint) it was further alleged in sub-paragraph D as follows (R. 17):

> "That the defendants, from July 11, 1944, to and including December 22, 1944, owned and controlled a sawmill producing lumber of a species of Western softwood lumber covered by RMPR 26, and *also owned and controlled a "custom mill" selling and providing "custom mill" services* on lumber *produced by the sawmill* to purchasers for use in the course of trade or business. That the defendants *did not secure authorization* from the Office of Price Administration at its Regional Office in San Francisco *to charge "custom milling" prices* as set forth in MPR 539 for such services, and that the total prices charged for said services, and lumber were in excess of the maximum prices established by

RMPR 26 for the lumber as delivered to the purchaser."

The stipulation of the parties (R. 62-65) is as follows:

"3. Maximum Price Regulation 539 *is a service regulation* covering maximum prices for surfacing and kiln drying lumber. And Revised Maximum Price Regulation 26 *is a commodity regulation establishing maximum prices for the sale of a species of lumber known as Douglas Fir* and other West Coast lumber. (R. 62).

5. M. A. Wyman was the principal owner and manager of the M. A. Wyman Lumber Company, White-Henry-Stuart Building, Seattle, Washington, from July 10, 1944, to and including December 22, 1944. (R. 63).

6. M. A. Wyman, M. H. Wyman and Edward Doran, as co-partners, were operating the Wyman Mill Company, located at Granite Falls, Washington, for the above-mentioned period.

7. M. A. Wyman during the period mentioned in paragraph 5, hereof, was a 50% stockholder and president of the Granite Falls Planing Mill, a corporation, with its operation located near Granite Falls, and said corporation had a representative in the office of the Wyman Lumber Company, in Seattle, Washington. That the M. A. Wyman, mentioned in paragraphs 5 and 6, hereof and also as president of the Granite Falls Planing Mill, is one and the same person. R. 63).

8. That Granite Falls Planing Mill during 1944 was located within 500 feet of the Wyman Mill Company. (R. 63).

9. That Edward Doran was superintendent of

the Wyman Mill Company and the Granite Falls Planing Mill during 1944. (R. 63).

10. That the Granite Falls Planing Mill bought the surfacing machinery from the Wyman Mill Company, and also occupied space which, prior to its incorporation, had been occupied by a portion of the Wyman Mill Company. (R. 64).

11. The M. A. Wyman Lumber Company sold, shipped, invoiced and received payment for 3,122,732 feet board measure of rough lumber from July 10, 1944, to and including December 22, 1944. That these figures were obtained from invoices, the originals of which are now within the possession of the defendants, herein, and which footage is further shown in Exhibit "A" appended to plaintiff's Second Amended Complaint. That it received payment for this lumber in the sum of $89,427.38. That said latter sum is in accordance with the prices set forth in RMPR 26. (R. 64).

12. The Granite Falls Planing Mill invoiced and received payment in the sum of $22,955.44 for surfacing charges on 3,122,732 feet board measure of lumber from July 10, 1944, to and including December 22, 1944, *being the same lumber mentioned in paragraph 11.* That these figures were obtained from invoices made out in the offices of the M. A. Wyman Lumber Company, White-Henry-Stuart Building, Seattle, Washington, the originals of which are now in the possession of the defendants herein, and which footage is further shown in Exhibit "A" appended to plaintiff's Second Amended Complaint. (R. 64).

13. During this period with respect to all of these shipments heretofore mentioned, a representative of the Granite Falls Planing Mill, using the office of the Wyman Lumber Company, made

out the Bills of Lading for the surfaced lumber providing for shipment of said lumber from the Granite Falls Planing Mill to the various customers, *showing the M. A. Wyman Lumber Company as shipper.* That such procedure was customary at said time. (R. 64-65).

14. The invoices for rough lumber, the invoices for surfacing, and Bills of Lading all bear the same date for each shipment, and the footage for the rough and surfaced lumber is the same in each case. (R. 65).

15. All sales concerned in this suit were made to purchasers who operated retail or wholesale lumber yards and were for use in the course of said purchaser's business." (R. 65).

Supplementing this stipulation is the testimony of Joseph Rothfield (R. 122), Edward Doran (R. 111), William C. Wurnsted (R. 181) and M. A. Wyman (R. 208).

Appellants offered no evidence to contradict any of appellee's witnesses, being content to rest their case upon the cross-examination of witneses called on behalf of appellee, so that there is no dispute in the essential facts.

The overcharges, according to the undisputed testimony given by the witness Joseph Rothfield, were $19,129.09. (R. 136).

This amount of overcharge is best explained by the witness Rothfield. (R. 135).

Q. What is that amount?

A. Do you mean the difference?

Q. Yes.

A. $19,129.09.

The Court: That represents what?

The witness: The over-the-ceiling charge.

The Court: You say that represents the overcharge?

The witness: Yes.

The Court: Now what do you mean by "overcharge"?

The witness: The difference in the price of the rough lumber and the surfaced lumber under Table 26. The rough lumber is billed correctly $89,427.38; and the identical lumber for surfacing S-4-S is billed $22,955.44, whereas under Table 26 the surfacing of that same lumber is $3826.35; so therefore you deduct the $3826.35 from the $22,955.44. You have an overcharge of $19,129.09. (R. 136).

Exhibit "A" attached to the amended complaint (R. 20-22) gives the detailed list of purchasers, the

amount collected from each, the ceiling price and respective amounts of overcharge aggregating a total of $19,129.09, which is nowhere disputed by appellants.

Another way of expressing it would be to say, you take the rough lumber, $89,427.38, and add to it $22,955.44—*the charge made for surfacing*, and you have a total of $112,382.82. It being conceded that the charge of $89,427.38 for the rough lumber is in accordance with the regulations, you then add *the ceiling price for surfacing* as provided for in RMPR 26, of $3826.35, gives a total of $93,253.73. By deducting $93,253.73 from $112,382.82, we find an overcharge of $19,129.09. The trial court was right in awarding judgment in that sum and its judgment should be affirmed.

ARGUMENT
In Answer to Appellants
I

Appellant claims that the second amended complaint (R. 39), introduced a new and different cause of action than that stated in the original (R. 2) and first amended complaints (R. 14), and therefore the action is barred by the provisions of Section 205(e) of the Emergency Price Control Act (50 U.S.C. App., Section 925e), as not having been commenced within one year.

It is difficult to follow counsel on this assignment because an examination of all three complaints (R. 2, 14, 39) shows that the violations alleged consisted of acts and practices in contravention to the provisions of RMPR 26 and MPR 539.

The case of *Salyers v. United States*, 257 F. 255, cited by appellant, hardly seems apt. There, the second amended complaint did introduce a new cause of action. An action on an assigned claim not included in the original complaint against which the statute of limitations had already run when the second amended complaint was filed. Here, however, no new cause of action has been introduced. In the original and amended complaints a corporate defendant was joined. This corporation was owned and controlled by the individuals constituting the other defendants named. It was through the medium of this corporation, which did the surfacing of the rough lumber supplied by the individual defendants, that appellants were, or thought they were, enabled to charge the over-the-ceiling prices which were charged.

We have heretofore set out herein the provisions of MPR 539 and RMPR 26 (pp. 4 to 7 herein) and it is because of the financial interest of the appellants in the corporation which did the surfacing, alleged in all three of the complaints and testified to at the trial,

that we assert it cannot be successfully contended that there has been any change whatever in the cause of action. Therefore the defense of the statute of limitations was properly overruled and denied by both Judge Bowen (R. 57) and Judge Speakman (R. 249). The authorities cited and relied upon by appellant therefore have no application to the instant case.

II

Appellants, as their second point, assert that RMPR 26 fixes no prices for services to lumber.

An examination of this regulation, as set out at p. 6 hereof, refers to price tables contained in Article V thereof. By Section 16 of this regulation it is provided:

> "Any practice which is a device to get the effect of a higher-than-ceiling price without actually raising the dollar-and-cents price is as much a violation of this regulation as an outright over-ceiling price. This applies to * * * devices making use of * * * services * * * trade understandings and the like."

Article V, Price Tables, Section 23, shows the maximum ceiling prices for different sizes and descriptions of Douglas Fir Lumber.

By billing their customers for rough lumber only, and having this "dummy" corporation (Granite Falls Planing Mill) bill the customer for the surfacing of this rough lumber separately, they were enabled to

secure a higher price. Although the shipments were made by the corporation, the consignor or shipper was the Wyman Lumber Company (Stip. par. 13 R. 64-5), definitely indicating that the business was that of the appellants beyond the slightest doubt.

The intent of appellants is clearly demonstrated by their application, under the provisions of Section 4(b) of MPR 539 or its predecessor, SSR 27-MPR 165, in filing the application Exhibit A-2 (R. 172) for authority to operate under that regulation, and continuing to do so notwithstanding that authority had not been granted. It was later refused (R. 196).

III

Appellants' next contention is that there is no evidence that appellants sold any surfaced lumber, and that the trial court's finding, No. VI, finds no support in the evidence.

This argument is without the slightest merit. The stipulation (R. 62) and the evidence of the witness Rothfield (R. 122), clearly shows that the appellants, through the use of a dummy corporation, and without authority first having been obtained from the Office of Price Administration, as required by regulation MPR 539, attempted to obtain, and did obtain, through the medium of a corporation in which they

had a substantial financial interest, prices in excess of the ceiling prices for this lumber. The only inference that can possibly be drawn from the undisputed evidence is as found by the trial court. This brings us back to the all inclusive Section 16 of RMPR 26, which reads:

> "*Any practice which is a device to get the effect of a higher-than-ceiling price* * * * *is as much a violation of this regulation as an outright over-ceiling price.* This applies to * * * devices making use of * * * services * * *."

And the trial court was right in making the finding complained of.

IV

The next contention is that none of the complaints alleged fraud or deceit, and it is therefore claimed that the court erred in admitting, over objection, the testimony of the witness Rothfield (R. 104, 113, etc.).

It is somewhat difficult to follow counsel's argument on this point.

The plain allegations of the second amended complaint are that appellants "*were engaged in the acts and practices hereinafter described,* which constituted *a violation of Revised Maximum Price Regulation 26.*"

Paragraph 4 of Count 2 alleges:

"That the defendants, being sellers subject to said regulation, made numerous sales from July 11, 1944, to and including December 22, 1944, to purchasers for use of consumption in the course of trade or business at prices in excess of the maximum prices fixed by the regulation, which sales are set forth in Exhibit "A," which is affixed hereto and made a part hereof by reference as fully as if set forth herein. The amount by which the prices charged by the defendants exceeds the maximum prices provided under RMPR 26 is $19,130.89."

No motion having been made by appellants to make the second amended complaint more definite and certain and no bill of particulars having been demanded (at least the record is barren of such a motion or demand), we submit that appellee could prove these allegations by any method it might see fit.

The following appears in the record at page 110:

"*The Court*: Pardon me, Mr. Hughes, I am sorry to interrupt you. Let's don't argue that. (Regulation MPR 165).

"The thing I want to know is this: The second amended complaint charges you with the sale of lumber beyond the ceiling price—in excess of the ceiling price. It doesn't say how you did it, it doesn't indicate how you did it.

"Now, you are caught by surprise or are you not when they offer to prove that your clients manipulated this thing through the Granite Falls Planing Mill and thereby raised the price of lumber?

Mr. Hughes: Well, I will say this, your Honor: The last day or two I have been trying to figure out how they were going to prove it.

The Court: Did they ever tell you how they were going to prove it?

Mr. Hughes: No, that was never gone into—how they were going to prove it.

The Court: I see nothing in the record that indicates that you were informed by any of the record. You came in and asked them to make that more definite and certain. Judge Bowen denied that promptly and gave you your right of discovery—that you could pursue that. If you were caught by surprise—if you didn't know that that was to be their method of proof, this Court will not permit them to prove it. In other words, if by this overall complaint they have got you in here and you didn't know what the cause was, and if you would have filed a different

answer in this action had you known that, the Court will not permit them to do it.

Now if you had of known that, would you have filed a different answer from that which you did file?

Mr. Hughes: Why, I think I would, your Honor. *I would have to think it over*, but I don't see how I could get by with the answer I filed in the case and meet such a charge." (R. 111).

In the printed record the colloquy between counsel and the Court is abruptly ended at page 52 of the transcript of proceedings at the trial (R. 111). So that to give this Honorable Court the benefit of the balance of this colloquy and the remarks of other counsel in the case we will have to leave the printed record and revert to the typewritten transcript of proceedings at trial. Commencing at line 23, page 52 of that record, we find the following:

The Court: What do you gentlemen say?

Mr. Hitchcock: I might say briefly—Mr. Porter has been dealing with Mr. Wyman—however, there are one or two things I would like to state.

If the court will note by the record that the de-

fendants were specifically informed by interrogatories of the overcharges on which we base our case.

The Court: That is where you refer to—

Mr. Hitchcock: I refer to the exhibits. * * * (Tr. p. 53).

Mr. Porter: (Tr. p. 54). In answer to Mr. Hughes' interrogatories, I have stated in there exactly which table should have been used on 2x4s, which table should have been used on planks and which table should have been used on small timbers, and which table should have been used on large timbers. In addition to that, I have been in his office on three different occasions. I took the invoice —that expressed the amount of (Tr. 55) rough timber that was billed out by M. A. Wyman Lumber Company. I put right beside it the invoice for surfacing, and right beside that the bill of lading,—all one transaction; and yet he insists that we are springing surprise on him."

The Court: (Tr. p. 59). Well, go ahead, call your first witness.

It is respectfully submitted there is no merit in this assignment.

V

Under this assignment it is stated that the trial court erred in its finding XVI (R. 70).

The evidence in support of this finding is overwhelming when all of the facts and circumstances are calmly considered.

First, we find that the Granite Falls Planing Mill was organized by these defendants as a corporation, M. A. Wyman being its President, having a 50% interest therein (R. 63).

Second, M. A. Wyman was the principal owner and manager of M. A. Wyman Lumber Company.

Third, M. A. Wyman, M. H. Wyman and Edward Doran, as co-partners were operating to Wyman Mill Company, located at Granite Falls, Washington. (Stip, par. 6, R. 63).

Fourth, M. A. Wyman Lumber Company sold, shipped, invoiced and received payment for the rough lumber. (Stip. par. 11, R. 64).

Fifth, Granite Falls Planing Mill invoiced and received payment surfacing charges. (Stip. par. 12, R. 64).

Sixth, the finished (surfaced) lumber was shipped to various customers by Granite Falls Planing Mill, but M. A. Wyman Lumber Company was named in the bills of lading as shipper. (Stip. par. 13, R. 65).

This clearly ties all of these parties into "a device to get the effect of a higher-than-ceiling price," in plain violation of Section 16 of RMPR 26, set out at pp. 6-7 herein, and the only inference that could logically be drawn from these facts is epitomized in the trial court's finding XVI (R. 70).

The finding, therefore, *is* sustained by the overwhelming evidence in the case.

VI

On this point it is argued by appellant that an officer of a corporation is not personally liable for the acts of the corporation. This is axiomatic.

In this case appellee did not seek, and the trial court did not attempt, to hold anyone individually responsible for the acts of the corporation.

The theory upon which the action was based and appellants were held liable in damages by the trial court was the use they made of this "dummy" corporation in securing higher-than-ceiling prices for their lumber, without securing prior authority by this

corporation, which was wholly owned by them, from the Regional Office of the Office of Price Administration, under the proceedings of Section 4(2) (b) of MPR 539 (see p. 4 herein) and nothing more.

It cannot be successfully disputed, from a fair consideration of all of the evidence, that this "dummy" corporation was a "device making use of 'services'" prohibited by the express terms of Section 16 RMPR 26.

In a proper case, we have no quarrel with the authorities cited by appellants, but assert those rules have no application here.

This action is one against appellants, doing business as M. A. Wyman Lumber Company, and as Wyman Mill Company for their use of the Granite Falls Planing Mill (which they owned), which enabled them to secure "higher-than-ceiling prices" for their lumber, the Regulation (Section 16 RMPR 26) expressly providing:

> "Any practice which is a device to get the effect of a higher-than-ceiling price * * * is as much a violation of this regulation as an outright over-ceiling price."

VII
ESTOPPEL

Appellants make an elaborate argument on this

point, but neglect to point out wherein such defense, even if available against the sovereign, has been pleaded.

Such a defense is not available as against the United States, which has, from the inception of this case, been the real party in interest.

The United States is neither bound nor estopped by acts of its officers or agents.

United States v. City and County of San Francisco, 106 F. (2d) 569;

Korman v. Federal Housing Administrator, 113 F. (2d) 743;

United States v. Stewart, 121 F. (2d) 705.

In any event, the Regulation requires that authority must be granted, as a condition precedent to the right and the very fact that the authority was *not granted*, regardless of the fact that the application was eventually denied, militates against rather than in favor of the contentions of appellants.

VIII

It is argued under this point that M. H. Wyman and Edward Doran were both dismissed from this suit on February 15, 1946 (R. 36).

We quote the order:

"It is further ordered and adjudged that M.

W. Wyman and Edward Doran, defendants above named, be and they are hereby dismissed from said suits *as individuals.*"

At the time the trial court signed the findings, conclusions and judgment, the record (R. 256-7) shows this:

Mr. Ogden: If your Honor please, Mr. Hughes did not mention any objection to the conclusions of law and I think that very clearly, paragraph 2 should be changed. That paragraph reads:

'Plaintiff is entitled to judgment against the defendants and each of them in the sum of $19,130.67 and his costs herein.'

I believe it should be interlined in there saying, 'but not in their individual capacity,' because otherwise it is stated, 'and each of them,' and they are named as individuals at the top in the heading to the case and I don't see how Mr. Doran as an individual would be protected unless that was interlineated in there.

Mr. Hughes: I had not gotten to the conclusions yet, but it does seem to me, in view of the fact that those two defendants, M. H. Wyman and Edward Doran, have been dis-

missed from the suit, that the judgment should not be against them; that the only defendatn now in the case is M. A. Wyman.

The Court: It cannot be against them in an individual capacity because they have been dismissed.

Mr. Hitchcock: That is right as to their individual capacity."

Of course, these appellants were all partners in the two companies doing business under the trade names M. A. Wyman Lumber Company, and Wyman Mill Company.

Orders (for lumber) came for the Wyman Mill Company (Doran testimony R. 114):

"Q. Will you describe to the Court the exact procedure involved during this period, July to December, in producing say, a rough dimension in the Wyman Mill; just describe how that lumber was produced.

* * *

A. Well, first orders came in for the Wyman Mill Company. They came in in the rough. Then we would get that order in the rough. Then we would get orders from the customer that wanted lumber to the Granite Falls

Planing Mill authorizing us to go ahead and resurface and plane and saw and remark and grade and load the lumber." (R. 115).

* * *

"Q. (By Mr. Hitchcock) Who produced this rough lumber you are speaking about; wasn't that the Wyman Mill Company?

A. Wyman Mill Company produced some of it and we bought a tremendous lot of lumber. We bought from a large number of mills throughout the war that had no planers, and we planed it and sold it on the market. (R. 116).

* * *

The Court: Did I understand you to say that you were a partner in the Wyman Mill Company?

The witness: I was a partner in this way: I was hired on a salary and I participated in the company." (R. 117).

It was stipulated (R. 144) that M. A. Wyman was the owner of 50 per cent of the stock in the Granite Falls Planing Mill, and that Edward Doran and M. H. Wyman each owned 60 shares of the capital stock of that corporation.

The M. A. Wyman Lumber Company, which, so

far as the record is concerned, was in the sole ownership of M. A. Wyman. This trade name was used as the shipper on the Bills of Lading covering all of the shipments shown on Exhibit "A" attached to the amended complaint. (Stip. par. 13, R. 64-5).

Thus, we have all of the defendants named in the second amended complaint properly before the court, M. A. Wyman, individually and doing business as M. A. Wyman Lumber Company, and M. A. Wyman, M. H. Wyman and Edward Doran, as co-partners doing business as Wyman Mill Company.

Each partner is liable, under the law, for the acts of the other partner and clearly it is in this capacity that each appellant is liable.

The statutes of the State of Washington relating to process and procedure will be found in *Remington's Revised Statutes, Section 236*, which reads:

> "When the action is against two or more defendants and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:—
>
> "1. If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise directs; and if he recovers judgment it may be entered against *all the defendants thus* jointly indebted so far only as it may be enforced against the joint property of all *and the separate property of the defendants served.*"

Livingstone v. Lovgren, 27 Wash. 102, 67 Pac. 599;

Peha's University Food Shop v. Stimpson Corporation, 177 Wash. 406, 31 Pac. (2d) 1023.

As a parting shot, on this point counsel says (Br. p. 36): "Nor was there any evidence even *remotely* connecting M. H. Wyman or Edward Doran with the violation of *any* regulation." This, of course, is not the fact.

Doran, for instance, was not only a partner in the Wyman Mill Company, but was also "superintendent" (R. 112). He testified his duties as superintendent consisted of buying logs for the mill (Wyman Mill Company) and supervising the operation of the mill (R. 113). He was also a stockholder in the Granite Falls Planing Mill (R. 144).

The stipulation (R. 62) clearly negatives the assertion made by counsel.

IX

The ninth point argued by appellants deals with their motion for a new trial, and raises nothing new.

Merely because counsel did not know how appellee intended to prove its case against his clients is no reason for the claim that the cause of action had been changed.

There was no change of issues of any kind. If counsel claimed surprise, he had the right to a continuance, and not having asked a continuance, his clients are now bound by the judgment as entered.

There being no error in the record, it is respectfully submitted that the judgment should be in all things affirmed.

Respectfully submitted,

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